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IN THE UTAH COURT OF APPEALS

PROVO CITY,
A Utah Municipal Corporation

Petitioner and Appellant

v.

DEPARTMENT OF WORKFORCE,
SERVICES, WORKFORCE APPEALS
BOARD, and JASON R. SMITH,

Respondents and Appellees

**REPLY BRIEF OF
APPELLANT**

Appellate Case No. 20110900

APPEAL FROM DECISION OF THE WORKFORCE APPEALS BOARD
AFFIRMING THE DECISION OF AN ADMINISTRATIVE LAW JUDGE
ALLOWING UNEMPLOYMENT BENEFITS TO JASON SMITH

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**APPELLATE COURTS
POSTMARKED**

MAR 07 2012

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Argument

I. Just cause was established for Smith's discharge.

The Workforce Appeals Board (the Board) argues in its brief that the Employment Security Act is to be liberally construed, and that not every legitimate cause for discharge justifies a denial of benefits. Yet, the case cited in support of this principle also holds that “the rule is that mere inefficiency or failure of good performance as the result of inability or incapacity, inadvertences, isolated instances of ordinary negligence, or good-faith errors in judgment or decisions do not constitute culpable conduct.” *Logan Regional Hosp. v. Board of Review*, 429, 723 P.2d 427 (Utah 1986). The Supreme Court of Utah then emphasized that it was the “concept of culpable conduct or fault” critical to determinations in this area. *Id.* The Board attempts to cast this case as a single instance of poor judgment inadequate to harm the employer. Smith's conduct in this case was not a good-faith error in judgment, ordinary negligence, inefficiency, or some other failure, but the victimization of a thirteen year old child. This was conduct far removed from the work errors contemplated by the Court in *Logan Regional Hospital*. In light of Smith's numerous admissions to the conduct and the totality of the record before the Board, any conclusion that his choice to touch the girl was anyone's fault but Smith's is unreasonable and irrational.

a. The City has demonstrated Smith's culpability.

The Board concedes that there is no dispute as to the seriousness of Smith's conduct in this case, and then contends that Provo City Corporation (the City) failed to

demonstrate culpability by failing to show any real or potential harm to the City. But the Board's opinion on this score rests squarely on the factual finding, disputed on appeal, that there is insufficient evidence in the record to prove Smith's touching of the child was illegal or inappropriate, which even Smith himself termed "disgraceful" in his brief to the Board. The Board argues that since the City did not show that Smith might, in the future, leave his shift, trespass on residential dwellings, and molest children, no real or potential harm was demonstrated. This argument presupposes that the potential harm to the employer can only be a repetition of the serious conduct during work hours, and ignores other harm to the City included in the record and presented to the Administrative Law Judge.

Once the City had concluded from its investigation that Smith had in fact touched the girl inappropriately based in part on his admission, it faced a dilemma if it continued to employ Smith. The City could either, with full knowledge, allow an accused child molester to work in residential neighborhoods, or place him on some kind of administrative leave. The first option was not tenable to the City, because it independently substantiated the accusations against Smith and expected him to be convicted, and knew of his admission. The Court need only suppose for a moment what sort of damage that would do to a municipality if it became widely known that the City continued to employ such an individual in residential neighborhoods. The damage to goodwill alone is adequate harm to show jeopardy to the City's rightful interest, let alone the potential civil liability if Smith had continued as an employee and committed another offense while on duty. If the City had taken the second option and removed Smith from

the streets, it would have been left paying his salary while necessarily paying another employee to perform the actual labor he should have been doing, a direct financial harm to the City. In the alternative, the City could have placed Smith on unpaid administrative leave, and hired another employee to do his work. But this would not have protected the City from the harm to goodwill of retaining such an employee where charges had been substantiated administratively and by admission. Accordingly, because of the seriousness of Smith's conduct, the City had no choice but to terminate him to protect its rightful interest as set forth by rule. UTAH ADMIN. R. 994-405-202(1). All of these reasons were set forth before the Administrative Law Judge and before the Board, but were ignored. R. 59, 73. Ultimately, Smith's choice to touch the thirteen year old female forced the City to take action, and nothing else.

The Board relies on *Gibson v. Department of Employment Security and U S WEST Communications, Inc.* in support of the idea that the adjudicator must balance work record, length of employment, and repeated conduct against the seriousness of the offense and the harm to the employer. The *Gibson* case provides an excellent contrast with this case in terms of seriousness of conduct. In that case, the claimant was terminated for inappropriately disclosing a requested tap and trace to document harassing phone calls. 840 P.2d 780, 782 (Utah Ct. App. 1992). The Court determined that the Board below failed to adequately consider other factors in addition to seriousness, and so reversed and allowed benefits. *Id.* at 785. *Gibson* does not stand for the premise that the seriousness of the conduct should be ignored, or that the most serious of any conduct could not overcome a strong record, length of employment, and other factors. Otherwise, *Gibson*

would produce a chilling effect the other direction and upset the balance contemplated by the Court. This Court has determined that “when the employee has a clean work record and there is little chance the conduct will be repeated, a more serious offense and more harm to the employer will be necessary to show culpability.” *Fieeiki v. Dep't of Workforce Servs.*, 2005 UT App 398, ¶ 2, 122 P.3d 706. There can be little question that the groping of a thirteen year old female is more serious conduct than ignorantly disclosing a tap and trace as occurred in *Gibson*. Smith’s conduct is so serious that it pushes the balance to the side of seriousness and harm in spite of his lengthy employment and clean work history.

The Board relies on *Southeastern Utah Association of Local Governments v. Workforce Appeals Board* and *Lane v. Board of Review* to emphasize work record, length of employment, and probability of repeated conduct and minimize the seriousness of Smith’s actions. Both cases are distinguishable from that before the Court. In *Southeastern*, the claimant was socializing and drinking with coworkers when she made sexually explicit comments to a coworker and touched his buttocks. 2007 UT App 20, ¶ 2, 155 P.3d 932. *Southeastern* is distinguishable because Smith’s actions, perpetrated against a child, are significantly more serious. While the employer in *Southeastern* could have avoided further harm by training and discipline, training and discipline could not undo the future harm to the City of continuing to employ a person for work in residential neighborhoods who had committed a sexual offense, or the harm of putting him on leave while his criminal case proceeded in terms of finances, goodwill, reputation, and trust for

the City. Smith's single act had much graver ramifications than those of the claimant in *Southeastern*.

In *Lane*, the claimant was fired for selling beer to a minor. 727 P.2d 206, 207 (Utah 1986). The case can be distinguished because the conduct is nowhere near as serious as Smith's, and because the Court determined that the claimant's acts were not intentional, as were Smith's. *Id.* at 211. The Board cites this case for the idea that "the degree of culpability which will disqualify an employee from receiving benefits involves 'volitional acts by an employee who could not have been heedless of their consequences.'" *Id.* at 211, quoting *Clearfield City v. Department of Employment Security*, 663 P.2d at 444. But this idea supports the City, and not the Board. Smith's touching of a minor was a volitional act of which he could not have been heedless of the potential consequences.

The Board suggests that the City could have imposed a lesser form of discipline and corrected Smith's behavior, and so just cause was not demonstrated. The City's arguments before the Administrative Law Judge set forth why this is not so. R. 59. If Smith had been placed on formal probation, the City would still have had to deal with the resulting harm that an accused child sex abuser would be working for the City in residential neighborhoods. This is not an illusionary harm. Retaining Smith without having him perform the work was also financially untenable. Once the City had substantiated the charge through its own investigation and Smith's admission, it had no choice but to discharge him to protect its rightful interest because Smith's conduct was so serious. Thus, Smith was culpable. "[A] single violation . . . may be sufficient to show .

... potential harm to the employer's interests." *Kehl v. Board of Review*, 700 P.2d 1129, 1134 (Utah 1985). It is difficult to contemplate a more serious single violation than that committed by Smith.

The Board attempts to distinguish this case from the *Fieeki* decision, on the rationale that the police officer's domestic violence was more directly involved with the employer's interest of combating violence. Without citing authority, the Board again attempts to narrow the idea of what constitutes an employer's rightful interest. This concept flies in the face of applicable rule cited in the *Fieeki* opinion:

Disqualifying conduct is not limited to offenses that take place on the employer's premises or during business hours. However, it is necessary that the offense be connected to the employment in such a manner that it is a subject of legitimate and significant concern to the employer. Employers generally have the right to expect that employees will refrain from acts detrimental to the business or that would bring dishonor to the business name or institution. Legitimate interests of employers include: goodwill, efficiency, employee morale, discipline, honesty and trust.

UTAH ADMIN. R. 994-405-207. It cannot seriously be argued that touching a thirteen year old female in the manner presented on the record is not detrimental to the City under this rule. Since this is so, *Fieeki* remains the most applicable case to the facts presented here, and favors a finding that the Board erred. It can be nothing less than a legitimate and significant concern to the City that one of its employees, who frequented residential neighborhoods alone, had committed such an offense as Smith admitted to a number of times. Any action short of discharge in this case would have been inadequate given the circumstances, particularly when considering the detrimental nature of Smith's acts, even if not repeated later, to the City's goodwill. Additionally, the City had legitimate and

significant concern for the negative impact on the trust Provo citizens could place in the City had Smith been retained, once the City had substantiated the conduct as the employer had done in *Fieeki*, before criminal charges had run their course. Smith's conduct carries a pejorative connotation in society and would have brought dishonor to the City had he been retained after the City substantiated the accusations against him.

The Board mischaracterizes the City's argument in its brief as challenging a finding that Smith's actions may not have been illegal or inappropriate. While the caption to Part I-a in the City's brief supports this interpretation, the body of the Part clearly takes issue with the finding that there was insufficient evidence in the record before the Administrative Law Judge to prove that the touching was in fact illegal or even inappropriate. Brief of Appellant, 8–12. The Board did make such a finding, and there is not substantial evidence in the record to support that finding as set forth in the Brief of Appellant.

The Board takes issue with the City declining to submit evidence of Smith's conviction on reconsideration. The City addressed this issue in Part II of the Brief of Appellant, and will not burden the Court with a repetition of the rationale for that tactical decision aside from referring the Court to that Part, and asserting that Utah Code Sections 35A-4-405(2)(a) and 35A-4-405(2)(b) would be rendered a nullity for behavior outside the workplace if a discharge with an admission like the one in this case is inadequate to demonstrate just cause, or inadequate to show that the conduct was deliberate, willful, and wanton, or inadequate to allow for termination under subsection (b). Surely the legislature did not intend this result.

The Board contends that the Board did not apply a criminal standard of proof. This contention is not supported by the record. The Board argues that it merely was inquiring into whether Smith had actually committed the crime to determine whether the seriousness of the offense was high for a culpability determination, while conceding elsewhere that there “is no dispute the seriousness of the alleged offense in this case is great.” Brief of Appellee at 8. The Board’s opinion does not support the contention that the inquiry was for seriousness only. The Board indicated that “the Claimant is entitled, as is everyone else, to be presumed innocent until proven guilty.” R. 95. The presumption of innocence in a criminal case is indicative of the heavy burden on the prosecution to prove the charge beyond a reasonable doubt. This is not a criminal proceeding, and the Board should have proceeded under a preponderance of the evidence standard. The words of the Board contradict an assertion that the Board was applying anything but a criminal standard, particularly when viewed in light of the whole record, which includes ample evidence that Smith actually committed the crime charged, while no evidence outside of speculation supports the Board’s finding that it is possible that the touching was not illegal or inappropriate. If the Board had appropriately applied a preponderance of the evidence standard, it would have determined that Smith was culpable. There is no direct evidence in the record that Smith did not engage in the conduct which gave rise to the criminal case, but there is direct evidence that he did engage in the conduct.

The Board then takes issue with the City’s reliance on the probable cause statement, but once again ignores the other evidence on the record that Smith did in fact

commit the conduct for which he was discharged. In addition to the statement, which includes Smith's initial admission, Smith admitted on his benefits application to admitting to the crime. R. 6. He also affirmed his admission before the Administrative Law Judge. R. 55. There was evidence before the Administrative Law Judge elicited through testimony of an investigating officer that the touching was inappropriate. R. 52–55. The idea that the probable cause statement is the only evidence and is somehow insufficient, in light of the whole record, places the Board's finding of insufficient evidence in the record to prove that the touching was illegal or inappropriate outside the bounds of reasonableness and rationality. Both in the Board's opinion and in the Brief of Appellee, all other indicators that the touching was illegal and inappropriate are ignored, while all assertions that the touching may have been otherwise are based on speculation and imagination. Liberally construing the Employment Security Act does not mean the Board had to ignore all other evidence presented, including that of the victim and investigating officers in this case, in favor of supposition, assumption, or contemplated possibility in favor of Smith completely unsupported by any evidence. For these reasons, the Board's opinion was unreasonable and irrational and should be reversed.

The Board next takes issue with the City's interpretation of Utah Code Section 35A-4-405(2)(b) on the grounds that Smith's admission together with other facts in this case could not give rise to termination because the conduct was not in connection with work. This assertion is based on a narrow reading of Utah Administrative Rule 994-405-207. The Board has cited no authority for the concept that in order for the conduct to be in connection with claimant's work, the connection to work must be direct and explicit.

The language of the rule in its entirety does not bear out this interpretation. The rule makes it clear that the conduct need not occur during work hours or at a work. UTAH ADMIN. R. 994-405-207. “Employers generally have the right to expect that employees will refrain from acts detrimental to the business or that would bring dishonor to the business name or institution.” *Id.* Smith himself describes his conduct as “disgraceful” and hurtful. R. 78. It is a subject of legitimate and significant concern to an employer to continue to maintain an employment relationship when such conduct is known to the employer. It would be disgraceful to the City to knowingly continue the employment of a power line worker who had committed such an act and send him into residential neighborhoods. This case is again similar in this respect to the *Fieeki* case. Reading the rule as narrowly as the Board urges would mean that an employee could not be terminated for criminal conduct which the employee admitted to, before conviction, unless the connection of the conduct with work was explicit and direct. Interpreting the rule in this manner would render the statute for discharge for commission of a crime meaningless except for cases with a criminal conviction. Interpreting the statute so narrowly defeats both the disjunctive language of Utah Code Section 35A-4-405(2)(b) allowing for discharge with an admission along with other facts and the language of Administrative Rule 994-405-207 and its definition of connection with work.

b. The City has demonstrated Smith’s knowledge of the City’s expectations.

The Board contends that Smith did not intentionally or knowingly disregard City policy. This contention again presupposes that Smith’s touching of the victim was

somehow appropriate, while this finding as challenged on appeal, and while there is ample evidence in the record that the touching was inappropriate. Moreover, the Board mischaracterizes the City policy in regard to behavior as not containing any language in regard to comportment outside of work. The policy actually reads that employees “are expected *at all times* to conduct themselves in a positive manner so as to promote the best interests of the City,” and the policy explicitly includes “[r]efraining from behavior or conduct deemed offensive or undesirable, or which is contrary to the City’s best interest.” R. 9 (emphasis added). The policy also explicitly states that conduct which “discredits the City, or is offensive to the public or fellow employees cannot be tolerated.” *Id.* The plain language of the policy indicates that it applies outside of work.

Moreover, it strains credulity to assert that Smith did not know committing a sexual crime against a child might result in termination. Applicable rule states that “[g]enerally, knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a written policy, except in the case of a violation of a universal standard of conduct.” UTAH ADMIN. R. 994-405-202(2). This Court has deemed far less offensive conduct to be a violation of a universal standard of conduct. The Court has deemed driving a company car on a suspended license to be such a violation. *Smith v. Workforce Appeals Board*, 2011 UT App 68, 252 P.3d 372. So, too, has the Court characterized swearing within hearing of customers and walking off a shift. *Bhatia v. Department of Employment Security*, 834 P.2d 574 (Utah Ct. App. 1992). In this case, not only did the City have a clear written policy, but Smith’s action violated a universal standard of conduct. It cannot be reasonably argued that touching a thirteen

year old female in the way described before the Administrative Law Judge by an investigating officer, and at least partially admitted to by Smith numerous times, does not violate a universal standard of conduct. It is generally expected that people in society will not engage in that type of conduct. Therefore, Smith had knowledge and the Board should be reversed as to the knowledge element of the just cause determination.

c. The City has proved the element of control.

The Board relies on its arguments as they relate to knowledge to contend that, since Smith was unaware that the City expected him to refrain from sexually abusing a child outside of work time, that he had no control over whether or not his conduct adhered to expectations. As set forth above, it is not tenable to argue that conduct of the kind engaged in by Smith is the type that requires a written policy. It is commonly understood that such behavior is unacceptable. Instead of making the control issue dependent on knowledge as the Board seeks to do, the rule states that “[t]he conduct causing the discharge must have been within the claimant's control.” UTAH ADMIN. R. 994-405-202(3). The record is completely devoid of any evidence whatsoever that Smith touching the thirteen year old female was somehow outside of his control. Smith’s brief to the Board demonstrates that he had control of his conduct. R. 78. His assertion that it did not negatively impact his “employer or in any part to do [his] job or responsibilities” is correct, but the assertion is correct because he was discharged, not because his conduct was not serious. If he had not been discharged, the City would have felt the negative impact, dishonor, and loss of goodwill and trust from its citizens, for continuing to

employ a person in residential neighborhoods who had inappropriately touched a thirteen year old child while the City knew the conduct had taken place.

II. The City has appropriately marshaled the evidence.

The Board then argues that the City has failed to marshal the evidence as required in an appeal of this nature. But this argument is incorrect because the City did marshal the evidence. The City invoked both case law and Appellate Rule to set forth the standard which the Board has elaborated on. Brief of Appellant at 8. The City has challenged a very specific factual finding that there “is insufficient evidence in the record before the Administrative Law Judge to prove that the touching was in fact illegal or inappropriate.”

R. 95. The Board complains that the City did not “present in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists.” *West Valley City v. Majestic Investment Co.*, 818 P.2d. 1311, 1315 (Utah App. 1991). Yet this is precisely what the City has done.

The Board’s factual finding in this context is somewhat unusual. Since the Board had found that there was insufficient evidence in the record, the City’s advocacy of that position was reduced to proving a negative. The City could have argued that there is no evidence in the record to show that Smith’s touching was illegal or inappropriate, but that assertion is not true or accurate. Since the City could not prove the absence of evidence which was not in fact absent, the alternative was to set forth any items on the record supporting an interpretation that Smith’s conduct may have been appropriate or legal. The City set forth every instance in the record that even remotely can be construed as evidence that Smith’s conduct may have been appropriate or legal.

Because the Board's finding of insufficiency was unreasonable and irrational, it cannot be defended outside of listing those instances where half-hearted denials of wrongdoing occurred on the record. It is impossible to take up a devil's advocate position by pointing to the record and asserting that the evidence of inappropriateness and illegality is not there, when it is there. The Board made a finding of insufficiency, but did not articulate the finding. If the Board's opinion included language that Detective Turnbow's testimony was deemed not credible by the Administrative Law Judge, it might be defended. If the Board's opinion stated that the probable cause statement was for whatever reason not credible evidence, it might be defended. If the Board's opinion stated that Smith's admissions could not be considered, the finding of insufficiency might be defended. In short, if the Board had affirmed a finding by the Administrative Law Judge, or determined on its own, that evidence indicating illegality and inappropriateness was not credible and therefore not considered, then the insufficiency finding could be defended.

But this was not the case. Instead, and as noted in the Brief of Appellant, the City was left to argue that the record lacked evidence that Smith's conduct was illegal or inappropriate. That position is indefensible. It is not possible to prove an insufficiency when no insufficiency exists. Nevertheless, the City pored over every line of the record and included in the Brief of Appellant each instance where any scrap or hint was given that Smith's conduct may have been legal or appropriate. The Board complains that the City has pointed to no evidence on the record showing that the finding of insufficiency was against the weight of the evidence and clearly erroneous. This is not accurate. The

City set forth a multitude of evidence in the record that demonstrates a finding of insufficiency is clearly erroneous. Brief of Appellant, at 9–12. Accordingly, the City has met the marshaling requirement and the Board should be reversed.

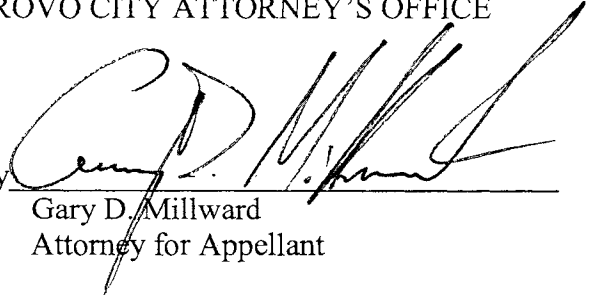
Conclusion

Contrary to the findings of the Board, there was not insufficient evidence in the record to demonstrate Smith's actions were illegal or inappropriate. This Court should reverse the Board on that finding. The City has adequately set forth culpability, knowledge, and control contrary to the Board's conclusions. The City has adequately marshaled the evidence supporting a finding of insufficiency. The Board's finding is erroneous. Since this is so, the Board should be reversed and benefits should be denied.

DATED this 7th day of March, 2012.

PROVO CITY ATTORNEY'S OFFICE

By



Gary D. Millward
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Proof of Service - Mailing Certificate

I hereby certify that, pursuant to Utah Rule of Appellate Procedure 26, two true and correct copies of the foregoing Reply Brief of Appellant were sent by first class mail this 7th day of March, 2012, to each of the following:

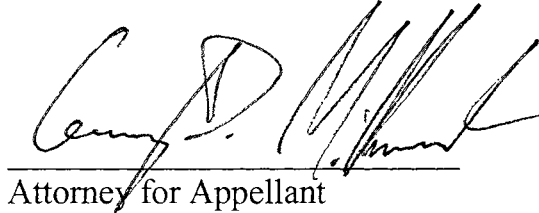
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1. This brief complies with the type volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 4,289 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. 27(b) because this brief has been prepared using a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font size 13.


Attorney for Appellant

Dated: March 7, 2012